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OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE REINSURANCE ASSOCIATION OF AMERICA, THE BROKERS AND REINSURANCE MARKETS ASSOCIATION, AND THE ALLIANCE OF AMERICAN INSURERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of three nonprofit trade associations whose members include companies engaged in the reinsurance business.[1] The Reinsurance Associa-

[1] Letters have been filed with the Clerk of the Court confirming that all parties have consented to amici's submission of this brief.

tion of America ("RAA") has 29 member companies, including professional reinsurers and reinsurance departments of insurance companies, principally engaged in the business of assuming property and casualty reinsurance. Approximately one half of RAA member companies are owned by foreign parent companies. Together, RAA members write over 75 percent of the reinsurance written by American professional property and casualty reinsurers on domestic risks. The Brokers and Reinsurance Markets Association ("BRMA") represents domestic reinsurance brokers, professional reinsurers, and reinsurance departments of insurance companies, all of whom obtain business through reinsurance brokers. The Alliance of American Insurers ("Alliance") represents over 250 insurance companies nationwide, including some reinsurers.

Amici's members have a substantial interest in this Court's interpretation of the federal rights afforded to reinsurers sued by state receivers of insolvent insurers. Most reinsurance contracts specify that all disputes must be resolved through arbitration, and reinsurers frequently invoke the jurisdiction of the federal courts to secure enforcement of these contractual terms under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208 (1995) (the "FAA"). The rule Petitioner ("Petitioner" or "Commissioner") advocates in this case, however, would permit States to vitiate these rights whenever contractual claims are asserted by the receiver of an insolvent insurer. Any such rule would have a far-reaching impact on domestic and foreign reinsurers in light of the frequency and magnitude of insurance insolvencies.[2] Amici accordingly submit this brief in support of Respondent.

STATEMENT

1. This case arises out of Petitioner's claim that Allstate Insurance Company ("Allstate" or "Respondent")

[2] Between 1969 and 1990, 372 property/casualty insurers in the United States became insolvent. A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers, 1969-1990* 1-2 (June 1991).

failed to pay sums due under the terms of its reinsurance contracts with Mission Insurance Company ("Mission"). Reinsurance is essentially insurance for insurance companies: such agreements are designed to spread and distribute risks of loss among a large number of companies. Thompson, *Reinsurance* 9, 24-25 (4th ed. 1966). In this way, an insurer's risk of insolvency in the event of a catastrophic loss is reduced; smaller insurers are able to offer coverage for large risks that might otherwise exceed their capacity; and insurers are able to offer a greater number of policies to the public. *See, e.g., United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 737-738 (1977). The Mission group of insurance companies had in fact entered into thousands of reinsurance agreements with reinsurers located throughout the United States and two dozen other counties. Pet. Br. at 10 n.25; Resp. Br. at 9.

Reinsurance agreements such as those at issue in this case have traditionally included a variety of terms designed to foster cooperation between the parties and to minimize costs. First, in order to avoid excessive operating costs that would make reinsurance too expensive, reinsurers rely on insurers' representations regarding a broad range of issues, including underwriting and claims processing by way of example, and forge a "bond of trust" that imposes a heightened duty of utmost good faith. John L. Baringer, *The Reinsurance Market: The Assuming Reinsurer, in Reinsurance* 329, 343 (Robert W. Strain, ed., 1980); Graydon S. Staring, *The Law of Reinsurance* 8:4 at 6 (1993). Adherence to these duties is so fundamental to the scheme of reinsurance that the law of California and other jurisdictions generally permit reinsurers to rescind their contractual agreements when an insurer deceptively breaches these duties. *See, e.g., Garamendi v. Abeille-Paix Reassurances*, No. C83233 (Cal. Sup. Ct., Los Angeles, Feb. 2, 1995).

Second, it has also long been the standard practice of most reinsurers to include clauses in contracts of rein-

surance that require binding, nonjudicial arbitration, and virtually all of Allstate's contracts with Mission contained such clauses. Resp. Br. at 10 n.15. Congress has recognized the importance of arbitration to the cost effective adjudication of disputes through the adoption of the FAA. The California Insurance Code does not contain any provisions purporting to abrogate a reinsurer's right to arbitrate in accordance with the terms of its contract.

Third, contractual rights of setoff are a fundamental feature of ongoing commercial relationships in the reinsurance industry because they promote economy of time and resources in settling debts between parties. Almost all reinsurance agreements contain setoff clauses.[3] The California Legislature has recognized the importance of setoff rights to the efficiency of insurance markets and specifically preserved such rights in the context of insurance insolvencies. Cal. Ins. Code. § 1031 (1995).[4]

2. In 1987, the California Insurance Commissioner sought and obtained an order from the California Superior Court declaring the Mission Insurance Company insolvent. J.A. 23-24. Petitioner contends (Pet. Br. 3, 12) that reinsurers caused Mission's insolvency by failing to pay sums due under the terms of their reinsurance agreements. That assertion is not supported by evidence in this record, however, and is refuted by a recent Congressional

[3] Marilyn J. Laughlin, *General Clauses for Most Treaties, in Reinsurance Contract Wording* 41, 86-88 (Robert W. Strain, ed., 1992); Thomas M. Tobin, *The Facultative Contract, in Reinsurance Contract Wording* 427, 442-443 (Robert W. Strain, ed., 1992).

[4] The California Supreme Court has upheld the right of reinsurers to setoff debts in the context of an insolvency, noting that "[t]o disallow setoff . . . would not only subvert clear legislative intent, but would also lead to an increased cost of insurance for the consumer, because offsetting an insurer's debts spreads the risks incurred by the insurer and often allows smaller insurers to remain in business." *Prudential Reinsurance Co. v. Superior Court*, 842 P.2d 48, 51 (Cal. 1992); *see also, Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1380 (7th Cir. 1990).

investigation. *See* Subcomm. on Oversight and Investigations of the Committee on Energy in Commerce, 101st Cong., 2nd Sess., *Failed Promises: Insurance Company Insolvencies*, 11-24 (Comm. Print 1990) (the "Dingell Report" or the "Report").

Contrary to Petitioner's assertions, the Dingell Report concluded that, "[t]he story of Mission's failure is really a tale of reckless and incompetent management." Dingell Report at 14.[5] In fact, the Report noted that the "subcommittee found several types of fraudulent activity at Mission," including fabrication of financial data submitted to reinsurers, false reports to state regulators, and bad faith dealing. *Id.* at 16-19. In addition, the Report further emphasized that Mission "abused the [reinsurance] system," through "excessive use of reinsurance," and by "knowingly deceiv[ing] the reinsurers who relied on them." *Id.* at 10, 12, 14. A three judge panel appointed by Mission's receivership court in fact concluded that various foreign reinsurers were entitled to rescind their contracts with Mission based upon Mission's misconduct. *Garamendi v. Abeille-Paix Reassurances*, No. C83233 (Cal. Sup. Ct., Los Angeles, Feb. 2, 1995).[6]

The conclusions set forth in the Dingell Report are also consistent with other studies of the causes of insurer insolvencies.[7]

[5] Such mismanagement "took various forms, including poor underwriting, severe underpricing, grossly inadequate reserving, accounting gimmicks, false reporting, and an overall disregard for the well being of Mission and the constraints of the marketplace." *Id.*

[6] The panel's decision has been recommended to the liquidation court, but the court has not yet confirmed that decision.

[7] According to a leading industry source, there were eight primary causes of most insurance company insolvencies between 1969 and 1990, and the failure of insurers to pay their obligations under reinsurance contracts was cited as a cause in only 7 percent of the insolvencies studied. A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers 1969-1990* 45-46 (June 1991).

3. Under Cal. Ins. Code § 1037 (1995), the Commissioner is vested with authority to "collect all monies due" an insolvent insurer and to "prosecute . . . legal proceedings" for that purpose. Pursuant to these powers, the Commissioner initiated litigation against Allstate and other reinsurers seeking to recover amounts allegedly due under the terms of the reinsurance agreements. The complaint alleged that the defendants breached the terms of their contracts by failing to pay sums due and engaging in tortious conduct that allegedly caused financial losses to Mission.[8] J.A. at 35-63.

Although the Commissioner chose to file his action in the State Superior Court overseeing the Mission liquidation, nothing in the California statutes or the orders issued by the liquidation court required him to do so. *See* February 24, 1987 Order Appointing Liquidator and Restraining Order at ¶ 8, J.A. 26-28 (enjoining "[a]ll persons . . . from instituting or prosecuting any action or proceedings *against* [Mission], or . . . [t]he liquidator of [Mission], without the consent of this Court") (emphasis added).

Allstate did not institute any action against the Commissioner. Instead, Allstate simply removed the action that had been filed against it to federal court as expressly permitted by federal statute, *see* 28 U.S.C. § 1441 (1994), and filed a motion to stay the federal proceedings pending arbitration pursuant to the terms of the FAA. 9 U.S.C. § 4 (1970).

SUMMARY OF ARGUMENT

Petitioner and his amici contend that federal courts are required to undertake a balancing of state and federal interests in deciding whether to abstain from exercising jurisdiction, and that the Ninth Circuit's decision must be reversed because it failed to follow that rule. This Court should reject that view and affirm the decision of the

[8] Allstate was not named in the tort counts of the complaint.

Ninth Circuit on either of two independent grounds. First, for the reasons set forth in the brief of Respondent and not addressed herein, federal courts have discretion to weigh competing interests and decline the exercise of jurisdiction only in cases involving a limited category of claims seeking equitable relief. No such claims are at issue in this case. Second, even if this Court were to accept Petitioner's argument that a balancing of interests is required, it should nevertheless affirm the decision of the Ninth Circuit. California does not have a substantial interest in establishing exclusive jurisdiction to adjudicate the Commissioner's claims against reinsurers, and the federal interests in providing a forum to both domestic and foreign corporations and in promoting the enforcement of arbitration agreements must prevail.

I. This Court has never authorized abstention in the absence of a substantial state interest that is substantially impaired through the exercise of federal jurisdiction. Petitioner claims that California has just such an interest in this case because it has established exclusive jurisdiction to adjudicate claims brought by the Commissioner against reinsurers in the liquidation court, and that the liquidation scheme "cannot be meaningfully carried out if the various elements necessary to the process can be spread out over multiple jurisdictions." Pet. Br. at 31. Petitioner contends that this Court has already found such interests sufficient to support abstention in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189 (1935). This Court's precedents, however, leave no room for that conclusion. None of the factors that have supported a finding that the State had a substantial interest in the assertion of exclusive jurisdiction are present in this case.

First, the Commissioner's adjudication of claims against reinsurers does not implicate "distinctively local" interests of the State. As Petitioner in fact concedes, the "reinsurance market is international" and the availability of reinsurance through the international markets is essential to an insurer's ability to "issue additional policies to the public." Pet. Br. at 10, 11.

Second, the State does not have a substantial interest in asserting exclusive authority over the Commissioner's claims against reinsurers because the Commissioner and the California courts do not have discretion to weigh public policy factors in adjudicating such claims in the aftermath of an insolvency. Instead, such disputes must be resolved with common law and statutory principles which can readily be applied by federal courts.

Third, the California Legislature has not even purported to vest the liquidation court with exclusive jurisdiction over the Commissioner's actions against reinsurers. In a variety of respects, the scheme adopted by California recognizes the necessity for adjudication in multiple jurisdictions. Contrary to Petitioner's contentions, the liquidation court did not even purport to enjoin the initiation of this action against Allstate outside the liquidation court, and the California Supreme Court has expressly held that Cal. Ins. Code § 1020 (court's power to issue injunctions) does not vest exclusive jurisdiction in the liquidation court.

Fourth, California does not have a substantial interest in asserting exclusive jurisdiction because this Court has repeatedly held that the exercise of *in personam* jurisdiction over claims related to an *in rem* proceeding does not impermissibly interfere with ongoing *in rem* proceedings in state court. The California Supreme Court has in fact acknowledged the logic of this rule and upheld the right of a plaintiff to bring a personal injury action against an insolvent insurer outside the liquidation court.

Finally, the rule Petitioner seeks would actually undermine the California scheme by abrogating a reinsurer's pre-existing right to remove an action to district court. The insolvency scheme was not designed to strip defendants in actions initiated by the Commissioner from asserting "important rights to which it would be entitled" in the absence of an insolvency.

II. Even if California had an interest in preventing the assertion of federal jurisdiction in this case, that interest would not outweigh the substantial federal interests in providing a forum to diverse defendants and in promoting enforcement of the terms of the FAA.

In this case, Allstate invoked its rights under the FAA to compel binding arbitration in accordance with the terms of its contracts. The FAA establishes that agreements to arbitrate, which are almost universally included in reinsurance contracts, are "valid, irrevocable, and enforceable." The federal interest in securing enforcement of such agreements is in fact so paramount in the context of international agreements—many of which were involved in the Mission insolvency—that Congress has granted district courts federal question jurisdiction, without regard to the amount in controversy, to enforce such agreements, and has granted defendants a right to remove any state court action relating to such an agreement at any time before trial. The rule Petitioner advocates—abstention for the purpose of permitting the liquidation court exclusive jurisdiction to adjudicate all claims—would completely vitiate these important federal interests. Even assuming that a district court were permitted to balance federal and state interests, any such balancing would require the district court to retain jurisdiction.

ARGUMENT

I. CALIFORNIA DOES NOT HAVE A SUBSTANTIAL INTEREST IN ESTABLISHING EXCLUSIVE JURISDICTION TO ADJUDICATE CLAIMS BROUGHT BY THE COMMISSIONER AGAINST REINSURERS

Petitioner contends that the district court should not be permitted to determine whether arbitration is required under the terms of Allstate's reinsurance agreements and the FAA because the California liquidation court assumed "sole and exclusive jurisdiction" over proceedings related to Mission's insolvency pursuant to the California insolv-

ency scheme. Pet. Br. at 18 n.19, 31. According to Petitioner, the liquidation of Mission "cannot be meaningfully carried out if the various elements necessary to the process can be spread out over multiple jurisdictions." Pet. Br. at 31. It is apparent, however, that the California scheme does permit adjudication in "multiple jurisdictions," and that none of the factors underlying this Court's decisions in *Burford v. Sun Oil Co.* and *Penn General Cas. Co. v. Pennsylvania* would permit abstention in this case.

A. Adjudication Of Claims Against Reinsurers Does Not Implicate Distinctively Local Concerns

In *Burford*, the Texas Railroad Commission granted a permit to drill four wells on a Texas oil and gas field. A litigant filed suit in federal court seeking to enjoin the issuance of the permit, and this Court found that abstention was appropriate. In determining that the assertion of federal jurisdiction would disrupt the Texas regulatory scheme, this Court emphasized that the rights in dispute—the availability of a permit to drill oil in Texas—were "distinctively local." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989) (explaining *Burford*).

In stark contrast, the contractual relationships of reinsurers are "distinctively" international in character. Petitioner in fact concedes (Pet. Br. at 10) that the "reinsurance market is international" and the availability of reinsurance through international markets is essential to an insurer's ability to "issue additional policies to the public." Pet. Br. at 11. Because one geographic market may have greater capacity to absorb risk than another at a given time, the business of reinsurance freely crosses national and geographical boundaries, and reinsurers spread risks around the world. Thus, "a vast and complex network of reinsurances is widely understood to be essential to the

provision of coverage for many of the high values requiring insurance today[.]" [9]

Much of the reinsurance purchased by American insurers and reinsurers in fact comes from outside the United States: as of 1993, U.S. insurers ceded over $13 billion in premiums to, and reported reinsurance recoverables of over $39 billion from more than 2,000 non-U.S. reinsurers in over 90 jurisdictions. RAA, *The U.S. Reinsurance Market in 1993: An Analysis of Annual Statement Data* 2-7 (1995). Reinsurers outside the United States account for approximately 40 percent of all reinsurance assumed from insurers in the United States, and only 27 of the 100 largest reinsurers in the world are American. *Id.* The Mission companies in fact had reinsurance agreements with companies "all over the world." Pet. Br. at 12 n.30.

As Congress and this Court have recognized, courts demonstrating a narrow or local perspective do not advance the commercial interests of the United States in international markets.[10] The Dingell Report in fact recently concluded that state courts, in the context of insurance insolvencies, have limited control over non-U.S. parties-in-interest. Dingell Report at 63 ("international reinsurance . . . seems beyond the effective jurisdiction and capabilities of state insurance commissions").

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[9] Graydon S. Staring, *The Law of Reinsurance* 1:4 at 5; Bernard L. Webb, et al., 1 *Principles of Reinsurance* 16 (1st ed. 1990) ("reinsurance has always been an international business . . . because the purpose of reinsurance . . . is to spread large risks and catastrophes over as large a base as possible").

[10] *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974) ("parochial" refusals by courts to enforce arbitration in international contracts would impair foreign commerce); *Banco Nationale de Cuba v. Sabbatino*, 376 U.S. 398, 424-425 (1964) ("rules of international law should not be left to divergent and perhaps parochial state [court] interpretations"); 9 U.S.C. §§ 201-208 (providing for federal court enforcement of international arbitration agreements).

B. The Commissioner's Claims Against Reinsurers Must Be Resolved Through The Application Of Legal Principles And Not Policy Judgments

An essential element of this Court's decision to abstain in *Burford* was the fact that the Texas regulatory scheme vested the Commissioner and the reviewing state court with "broad discretion" to weigh diverse policy interests concerning economic development and conservation in determining whether the issuance of drilling permits would further the public interest. 319 U.S. at 320, 323-327. Federal courts cannot fulfill that state policy-making function. As the California Supreme Court has definitively held, however, the Commissioner and the California courts do not have discretion to weigh public policy factors in adjudicating claims asserted against reinsurers in the aftermath of an insolvency.

In *Prudential Reinsurance Co. v. Superior Court*, 842 P.2d 48 (Cal. 1992), the Commisioner sought to prevent one of Mission's reinsurers from exercising a contractual right to set off monies due from Mission against amounts the reinsurer owed to Mission. The Commissioner contended that "considerations of public policy and equity should preclude reinsurers' rights to set off debts they claim to be owed by the Mission companies" because the sums available to distribute to policyholders would be greatly reduced if reinsurers could exercise their setoff rights. 842 P.2d at 61. The court nevertheless declined to defer to the Commissioner's interpretation because he was only authorized to act as the "liquidator with the same rights and obligations of the insolvent insurer pursuant to the terms of the reinsurance contract," *Id.* at 58, and the court's mandate was solely to interpret the terms of the contract and apply a "broadly phrased statute permitting setoff." *Id.* at 63. The court found that the "economic arguments" favoring a different outcome had to be "addressed to the Legislature" because " '[w]e are unwilling to engage in complex economic regulations under the guise of judicial decisionmaking.' " *Id.* (*quoting Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1168, 278 Cal. Rptr. 614, 805 P.2d 873 (1991)).

The Commissioner and the California courts also have no discretion to weigh public policy in adjudicating the dispute at issue here. The threshold issue is in fact one of federal law—whether Allstate is entitled to enforce its contractual right to arbitrate under the FAA. The Commissioner's claims for monies against Allstate and other reinsurers depend upon the application of contract, tort, and statutory principles and industry custom and practice that are routinely applied by arbitrators as well as state, federal, and foreign courts. Those principles are certainly not within the unique competence of the liquidation court.

C. California Law Does Not Vest The Liquidation Court With Exclusive Jurisdiction Over The Commissioner's Actions Against Reinsurers

In *Burford*, this Court emphasized that the Texas Legislature had designated a single court responsible for the oversight of the Texas Railroad Commission's decisions evaluating the public interest in the issuance of oil drilling permits. Petitioner contends that California has done that here as well by giving the liquidation court exclusive jurisdiction to decide all controversies relating to the insolvent insurer. Pet. Br. at 31. The Commissioner clearly misunderstands the California scheme.

1. Under the California insolvency scheme, the court supervising an insurance liquidation proceeding has jurisdiction to hear all actions against the insolvent. Cal. Ins. Code § 1058 (1995). The central purpose of the powers conferred on the liquidation court, however, is to oversee the Commissioner's conduct of the liquidation process.[11]

[11] *See, e.g.*, Cal. Ins. Code § 1011 (1995) (upon application of Commissioner, order conservation of insurer); Cal. Ins. Code § 1035 (1995) (approve Commissioner's expenses to administer receivership); Cal. Ins. Code § 1037(d) (1995) (approve Commissioner's transactions involving insolvent's property valued at over $20,000).

Nothing in § 1058 purports to grant the liquidation court with exclusive jurisdiction over all actions relating to the insolvent insurer. Instead, Petitioner relies upon Cal. Ins. Code § 1020 (1995), which authorizes the liquidation court to enjoin certain types of proceedings. Pet. Br. at 9 n.20.

Petitioner's reliance on § 1020 is misplaced. Section 1020 provides that the liquidation court "shall issue such other injunctions or orders as may be deemed necessary to prevent . . . the institution or prosecution of any actions or proceedings." In *Webster v. Superior Court*, 758 P.2d 596 (Cal. 1988), the Commissioner argued that this language should be interpreted to require the liquidation court to exercise exclusive jurisdiction over all claims against the insolvent insurer. *Id.* at 598-599. The California Supreme Court rejected that construction. Instead, the court held that Section 1020 merely "reflects a legislative intent to preserve an insolvent insurer's assets for orderly disposition by the Commissioner" and certainly should not displace adjudication—such as that in issue here—which does not seek recovery from the assets of the estate. 758 P.2d at 599. The *Webster* court determined that Section 1020 did not pose a bar to the plaintiff's maintenance of a personal injury action against the insolvent company outside the liquidation court because any recovery would be paid by the insolvent's insurers. The court accordingly found that adjudication of the claims against the insolvent would not pose any interference with the liquidation proceedings. *Id.* at 602-603, 605-607. In light of *Webster*, there is no conceivable basis to construe that section as requiring the Commissioner to initiate all actions to *augment* the assets of the estate in the liquidation court.

2. The liquidation court did not purport to enjoin the proceedings at issue in any event. Petitioner's contention that the court asserted "sole and exclusive jurisdiction" is not supported by the actual terms of the order. Pet. Br. at 18 n.19. The restraining order relied upon

by Petitioner merely enjoins persons from "instituting or prosecuting any action or proceedings *against* [the Commissioner]." Pet. App. at 120a (emphasis added). The action in this case, however, was initiated *by the Commissioner*—not "*against*" the Commissioner. Allstate's removal of the action to federal court in no way changes the fact that the Commissioner is the plaintiff, not the defendant. Nothing in the terms of the order accordingly required the Commissioner to file proceedings in the state liquidation court.

3. Although Petitioner contends that the purpose of California's insolvency law "cannot be meaningfully carried out if the various elements necessary to the process can be spread out over multiple jurisdictions," (Pet. Br. at 31), receivers of insolvent insurers have repeatedly invoked the jurisdiction of federal courts to resolve a broad range of claims. *See, e.g., Fidelity & Deposit v. Pink*, 302 U.S. 224 (1937) (state receiver sued reinsurer in federal court over reinsurance proceeds); *United States Dept. of Treasury v. Fabe*, 508 U.S. ——, 113 S.Ct. 2202 (1993) (state receiver initiated declaratory judgment action in federal court).[12] Moreover, the California Insurance

[12] *See also Todd v. Deposit Guar. Nat'l Bank*, 849 F. Supp. 1149 (S.D. Miss. 1994) (receiver sued safekeeping agent in federal court to recover insolvent's assets); *Eakin v. Continental Illinois Bank & Trust*, 212 F.R.D. 363 (N.D. Ill. 1988) (receiver sued bank in federal court for funds due under letter of credit); *Long v. Alexander & Alexander Servs.*, 680 F. Supp. 746 (E.D.N.C. 1988) (receiver sued liability insurer in federal court for state and federal RICO violations); *Carroll v. Brown*, 1987 U.S. Dist. LEXIS 613 (N.D. Ill., Jan. 26, 1987) (receiver sued shareholders of insolvent insurer in federal court for state and federal securities law violations); *Morgan v. American Risk Management*, 1990 U.S. Dist. LEXIS 9037 (S.D.N.Y., July 20, 1990) (receiver sued reinsurers to collect proceeds under reinsurance contract); *Stamp v. Insurance Co. of North America*, 908 F.2d 1375 (7th Cir. 1990) (state receiver sued reinsurance pool in federal court over reinsurance proceeds); *Evans v. American Surplus Underwriters Corp.*, 739 F. Supp. 1526 (N.D. Ga. 1989) (receiver as subrogee sued insurer in federal court for personal injury and breach of con-

Commisioner has invoked the jurisdiction of federal courts to sue on behalf of insolvent insurers, including at least one action seeking to recover amounts allegedly owed by reinsurers of the insolvent—the precise claim asserted in the present action. *Roxani Gillespi, Ins. Comm. of California, as Liquidator of C-F Ins. Co. v. Waite-Hill Assurance, Ltd.*, Case No. 87-08504, RMT (KX) (C.D. Cal. 1987) (action for declaratory relief,

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tract); *Bernstein v. Greater New York Mut. Ins. Co.*, 706 F. Supp. 287 (S.D.N.Y. 1989) (receiver as assignee of right to suit sued excess insurer in federal court for personal injuries); *Jump v. Manchester Data Sciences Corp.*, 424 F. Supp. 442 (E.D. Mo. 1976) (receiver sued data processing company in federal court for possession of insurance data); *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 300 F. Supp. 1083 (S.D.N.Y. 1969) (receiver sued shareholders in federal court for state and federal securities law violations); *Jump v. Goldenhersh*, 474 F. Supp. 1306 (E.D. Mo. 1979) (receiver sued insolvent's attorneys in federal court for money insolvent paid attorneys just before insolvency); *Superintendent of Ins. of New York v. Freedman*, 443 F. Supp. 628 (S.D.N.Y. 1978) (receiver sued company officers in federal court for state and federal securities law violations); *Jump v. Manchester Life & Cas. Management Corp.*, 438 F. Supp. 185 (E.D. Mo. 1977) (receiver sued management company in federal court for fraud); *Jump v. Pioneer Bank & Trust Co.*, 433 F. Supp. 38 (E.D. Mo. 1977) (receiver sued bank officers in federal court to force officers to recognize liquidator's right to vote stock owned by insolvent); *Smith v. Abbate*, 201 F. Supp. 105 (S.D.N.Y. 1961) (receiver sued policyholders in federal court over payment of assessments); *Combs v. Chambers*, 302 F. Supp. 194 (N.D. Okla. 1969) (receiver sued philanthropic foundation in federal court to enforce receiver's judgment against foundation); *Lyons v. Jefferson Bank & Trust*, 781 F. Supp. 1525 (D. Colo. 1992) (receiver sued bank in federal court over possession of assets); *Curiale v. Amberco Brokers Ltd.*, 766 F. Supp. 171 (S.D.N.Y. 1991) (receiver sued brokers in federal court for breach of reinsurance contract, receiver opposed brokers' motion to remand based on abstention); *O'Connor v. Insurance Co. of North America*, 622 F. Supp. 611 (N.D. Ill. 1985) (receiver sued reinsurers in federal court to collect reinsurance proceeds); *Keehn v. Excess Ins. Co. of America*, 129 F.2d 503 (7th Cir. 1942) (receiver sued reinsurer in federal court to collect reinsurance proceeds).

reformation, breach of contract, and other claims against a reinsurer of an insolvent insurer).

4. Other provisions of the California scheme further confirm that the legislature did not contemplate "a single, integrated proceeding to . . . adjudicate claims." Pet. Br. at 31. That scheme, for example, provides express authority for the prosecution of a variety of litigation in other jurisdictions.

First, the legislature clearly contemplated that the California Insurance Guaranty Association ("CIGA") would be involved in litigation outside the liquidation court. CIGA was formed for the purpose of assuming some of the insurer's obligations to policyholders in the event of insolvency. Thus, payment of some claims to policyholders is made directly by the liquidator, but others are made by CIGA and other state guaranty associations. Cal. Ins. Code § 1063.2 (1995). In the Mission insolvency alone, guaranty fund costs (i.e., the cost of covered policyholder claims) are estimated at $458 million. A.M. Best, *Best's Insolvency Study supra* at 45-46 (June 1991).

The California Legislature has nevertheless given CIGA the same rights as the "*insolvent insurer would have had if not in liquidation*, including . . . the right to . . . appear, defend, and appeal a claim *in a court of competent jurisdiction*." Cal. Ins. Code § 1063.2(b)(1) (1995) (emphasis added).[13] Because California, and every other State for that matter, created a guaranty fund to act as the insurer with regard to the processing and adjudication of policyholder claims, instead of the liquidator, it is plain that the California Legislature did not

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[13] The Guaranty Association takes the place of the insurer, processes and pays claims, and *substitutes the insurer in ongoing litigation involving the policies wherever such litigation is pending. See* Cal. Ins. Code § 1063.2(b) (1995). Because an insolvent insurer likely did business in all fifty states, the guaranty fund's responsibility likewise can extend to all the insolvent's literally thousands of policyholders and their claims in litigation in all fifty states.

contemplate a single, integrated insolvency proceeding as Petitioner asserts.

Second, when an insolvent California insurer has assets in another State, the liquidator may initiate an "ancillary" receivership proceeding in that other State to dispose of claims and assets there. Cal. Ins. Code § 1064 (1995). California's Uniform Liquidation Act provides that "non-domiciliary creditors may file and prove their claims before ancillary receivers . . . [and] the domiciliary receiver may sue in the reciprocal state to recover any assets of a delinquent insurer to which he or she may be entitled under the law." Cal. Ins. Code § 1064.1(f)(3) and (6) (1995). Further, where a nonresident of California files a claim in an ancillary receivership proceeding, and California is the situs of the domestic receivership, "the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount, and shall also be accepted as conclusive as to its priority." Cal. Ins. Code § 1064.4(b) (1995).

D. This Court And The California Supreme Court Have Rejected The View That *In Personam* Proceedings Impermissibly Interfere With The Conduct Of An Insolvency Proceeding

This Court has repeatedly held that the exercise of *in personam* jurisdiction over claims related to an *in rem* proceeding, such as the liquidation proceeding pending before the California receivership court, does not interfere with the state court's proceedings. *See, e.g., Morris v. Jones*, 329 U.S. 545, 549 (1947). There is no dispute that the underlying causes of action in this case are *in personam*. There is accordingly no basis to conclude that abstention is necessary to prevent disruption of the state proceedings in this case.

1. In *Morris*, this Court determined that principles of comity did not bar a state court from exercising jurisdiction over an *in personam* claim against an insurance company during the pendency of liquidation proceedings in

another state. This Court reasoned that "the establishment of the existence and amount of a claim against the debtor [in a non-liquidation court] in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have." 329 U.S. at 549.

These principles have consistently been applied in a variety of contexts.[14] The California Supreme Court has in fact acknowledged the logic of this rule and upheld the right of a plaintiff to bring a personal injury action against an insolvent insurer outside the liquidation court. *Webster v. Superior Court*, 758 P.2d 596 (Cal. 1988).

2. In contrast, principles of comity have been construed to bar state and federal courts from exercising concurrent jurisdiction over *in rem* actions involving the same res. It is for this reason that federal courts have on occasion declined to exercise their *in rem* jurisdiction where the State had a strong interest in presiding over the *in rem* proceeding. *See Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189 (1935); *Pennsylvania v. Williams*, 294 U.S. 176 (1935). That rule, however, has no application

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[14] *See, e.g., Coit Independence Joint Venture v. Federal, Sav. & Loan Ins. Corp.*, 489 U.S. 561, 575 (1989) (rejecting FSLIC's argument that judicial adjudication of claims outside its administrative process would interfere with its liquidation powers, noting that "it was well established at common law" that suits determining that existence or amount of a claim did not interfere with a liquidation court's jurisdiction or the liquidation process); *Markham v. Allen*, 326 U.S. 490, 494 (1946) (rejecting the claim that adjudication of an *in personam* action in federal court against an estate would interfere with probate proceedings in state court because the *in personam* judgment did not cause any direct "interference with property in the possession or custody of a state court" despite the fact that the probate court would be bound to recognize the validity of the judgment entered by the federal court when distributing assets); *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 619-620 (1936) (no conflict between state and federal court jurisdiction in national bank liquidation action).

to this case because the district court was not requested to assert *in rem* jurisdiction. And this Court has confirmed that the rule in *Penn General* has no application to the exercise of jurisdiction over *in personam* claims such as that in issue.[15]

Petitioner's claim that *Pennsylvania v. Williams* and *Penn General* adopt a special abstention doctrine for state insolvency proceedings, Pet. Br. at 43-44, is accordingly misplaced. In fact, the potential for interference with the ongoing liquidation process is even more remote in this case than in decisions such as *Morris* because the claims at issue have not been asserted against the insolvent insurer and therefore have no potential to diminish the assets available for distribution. *Cf. Granfinanciera v. Norberg*, 492 U.S. 33 (1989)[16]; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion)[17].

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[15] *See, e.g., Markham v. Allen*, 326 U.S. at 490 (describing *Penn General* as a rule barring exercise of *in rem* jurisdiction over property in the custody of a state court); *Bradford*, 297 U.S. 613, 619-20 (rejecting the argument that the *Penn General* rule of comity should require dismissal of an *in personam* action).

[16] The *Granfinanciera* Court held that a bankruptcy trustee's action against a party for fraudulent transfer of assets could not be tried before a bankruptcy judge without a jury, because such an action was not part of the *in rem* proceeding but "more nearly resemble[d] state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." 492 U.S. at 56.

[17] Specifically, the plurality noted that the "right to recover contract damages to augment [an] estate" is a "private right" that is not created by the law of bankruptcy, and that the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages." 458 U.S. at 71-72.

E. Abstention Undermines California Policy By Permitting The Commissioner To Unnecessarily Impair The Rights Of Reinsurers

Petitioner's contention that California policy is furthered by permitting the Commissioner to require the adjudication of its claims against reinsurers in the liquidation court is not supported by California precedent. In *Kinder v. Superior Court of Orange County*, 144 Cal. Rptr. 291 (Cal. Ct. App. 1978), the California Appellate Court determined that the legislature had not vested the Commissioner with powers to abrogate important procedural rights of litigants sued by the Commissioner to recover assets for the estate. That reasoning compels the conclusion that it is also not California policy to abrogate a reinsurer's right to remove actions to federal court.

In *Kinder*, the Commissioner sought to utilize an order to show cause in the liquidation court to recover sums allegedly due the insolvent insurer under the terms of an agency contract. The Commissioner maintained that the liquidation court could invoke the order to show cause against the defendant at the request of the Commissioner pursuant to the Commissioner's authority to prosecute "legal proceedings" under Cal. Ins. Code § 1058. The California Appellate Court disagreed. The court reasoned that the legislature would not have intended the liquidation court to use its "summary process to marshal assets of an insolvent estate" with respect to a claim "for an unliquidated and disputed debt alleged to be due under . . . the agency contracts," because that process "would deprive [the defendant] of important rights to which it would be entitled in an independent action." 144 Cal. Rptr. at 296. There is similarly no basis to conclude that it is the policy of the State of California to derogate a reinsurer's federal right to invoke federal diversity jurisdiction and to enforce its arbitration agreements.

As the California Supreme Court emphasized in the *Prudential Reinsurance* case, the Commissioner simply accedes to the rights of a private insurer when he initiates

in personam litigation against reinsurers to augment the assets of the estate. 842 P.2d 48, 54, 59 (Cal. 1992). The fairness of the adjudicative process should accordingly not be compromised at his request. The importance of preserving the procedural rights of litigants sued by the Commissioner was in fact recently underscored by the findings of the Dingell Report. The subcommittee emphasized that the Commissioner has not acted as an impartial public official in pursuing efforts to garner assets for the Mission estate. The Report explained that, "the receiver for Mission refused to acknowledge that the noxious management behavior at Mission observed by the subcommittee constituted fraud, as it might well have ruined his civil actions to recover $2.2 billion from Mission's reinsurers if he had admitted that fraudulent behavior had occurred." Dingell Report at 62.[18]

II. ANY RULE GRANTING EXCLUSIVE JURISDICTION TO THE LIQUIDATION COURT TO ADJUDICATE CLAIMS AGAINST REINSURERS WOULD CONTRAVENE IMPORTANT FEDERAL INTERESTS

Even if California had an interest in preventing the assertion of federal jurisdiction in this case, that interest would not outweigh the substantial federal interests in providing a forum to diverse defendants and in promoting enforcement of the terms of the FAA.[19]

[18] The Report further stated: "With no real incentive to discover management fraud, and with a strong financial reason not to find it, the receiver is not in a position to issue a credible determination regarding the existence of fraudulent activity by senior management admission, yet he is the only state official assigned to investigate the insolvency. Marshalling assets and pursuing wrongdoers are both important public functions when an insurance company fails and those two distinct tasks should not be combined in a manner that prevents one or the both of them from being faithfully performed." *Id.*

[19] The importance of the availability of diversity jurisdiction is discussed in the amicus brief of the National Association of Independent Insurers, *et al.*

A. The Rule Advocated By Petitioner Is Inconsistent With The Federal Interest In Promoting Arbitration

Petitioner's argument is inconsistent with federal policy concerning arbitration in two respects. First, the logic of the rule Petitioner advocates—the need to grant the liquidating court sole and exclusive authority to adjudicate all claims against reinsurers—would necessarily preclude arbitration. Any such rule, however, is flatly inconsistent with the FAA. Second, Congress has vested federal courts with jurisdiction to enforce the FAA for the very purpose of guarding against judicial hostility to arbitration agreements. A rule of abstention would totally undermine that Congressional goal.

1. The adoption of Petitioner's rationale in this case cannot be reconciled with Congressional policy promoting the enforcement of contractual agreements to arbitrate. If what Petitioner claims is true—that California's statutory insolvency scheme requires the liquidation court to exercise exclusive jurisdiction to adjudicate claims against reinsurers—then arbitration could not occur in the context of any California insurance insolvency. Any such interpretation of California law, however, is preempted by the conflicting Congressional policy adopted in the FAA.[20]

The FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with rules applicable to other contracts, 9 U.S.C. § 2, and

[20] There is also no basis to interpret California law to bar enforcement of arbitration clauses in agreements with insolvent insurers. The California Insurance Code contains no such provision. In addition, California courts have confirmed that litigation brought by the Commissioner should proceed in the same manner as if it had been brought by the private insurer prior to insolvency. *See supra* at 21-22. If California law were interpreted to prohibit arbitration in these circumstances, it would necessarily be preempted by the FAA unless saved from preemption by the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1970). That issue, however, is one of federal law, and therefore provides no basis for abstention.

grants federal courts the power to enforce arbitration agreements by compelling arbitration, staying proceedings pending arbitration, and affirming arbitral awards, 9 U.S.C. §§ 3, 4, 9. The federal policy adopted in the FAA is in fact so compelling that this Court recently reaffirmed the conclusion that the FAA "pre-empts state law; and . . . state courts cannot apply state statutes that invalidate arbitration agreements." *Allied Bruce-Terminex Co. v. Dobson*, 513 U.S. ——, 115 S.Ct. 834, 838 (1995) (citation omitted). As this Court further observed in *Allied Bruce*, the basic policy underlying the FAA is to "overcome court refusals to enforce agreements to arbitrate." *Id.* And Congress found that arbitration must be enforced even where enforcement leads to "piecemeal" adjudication of controversies. *Dean Witter Reynolds, Inc. v. Bird*, 470 U.S. 213, 221 (1985).

The need to vigorously enforce the FAA in fact has special importance to the reinsurance industry. As set forth, arbitration clauses have almost been "universally included in reinsurance contracts," R. Carter, *Reinsurance* 146 (1979), in an effort to reduce the costs, hostilities and delays engendered by litigation, and to permit resolution of controversies by experts familiar with industry custom and usage. *Prudential Lines v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983). In light of the number of insurance insolvencies that have occurred in recent years, and the magnitude of the claims asserted by insurance commissioners against reinsurers,[21] the rule Petitioner advocates would seriously erode the cost saving function of arbitration.

Moreover, the international characteristics of the reinsurance industry further heighten the need to vigorously enforce reinsurers' contractual rights to arbitrate. This Court held in *Scherk v. Alberto-Culver Co.*, 417 U.S. at 516-17, that the "parochial refusal by the courts of one country to enforce an international arbitration agreement" would "surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." This Court further observed that Congress adopted Chapter 2 of the FAA, 9 U.S.C. §§ 201-208, for the very purpose of enforcing the terms of an international treaty requiring enforcement of international arbitration agreements. 417 U.S. at 420 n.15. This Court went on to explain that the delegates to the Convention on Recognition and Enforcement of Foreign Arbitral Awards "voiced frequent concern that courts of signatory countries . . . should not be permitted to decline enforcement . . . in a manner that would diminish the mutually binding nature of the agreements." *Id.*

2. Abstention in the context of this case directly undermines Congressional policy because Congress vested federal courts with jurisdiction to enforce arbitration agreements in part to guard against judicial hostility to such arrangements. Moreover, Congress established federal question jurisdiction and expansive rights to remove state court actions relating to foreign arbitration agreements. See 9 U.S.C. §§ 203, 205.[22] As set forth, the insolvent insurer in this case had entered into such agreements with numerous foreign reinsurers and the prevalence of foreign reinsurance supports the conclusion that such agreements will be at issue in most insurer insolvencies.

There is accordingly little justification to give credence to the Commissioner's view that his claims against reinsurers must be adjudicated in the liquidation court when Congress has clearly foreclosed that option with respect to agreements with foreign reinsurers (when the contract requires arbitration). Moreover, Petitioner concedes that

[21] *See supra* at 2, 15-16.

[22] Section 203 creates federal question jurisdiction without regard to the amount in controversy and Section 205 grants defendants a right to remove state court actions "any time before trial" where the subject of the proceeding in state court "relates to an arbitration agreement or award" encompassed within the Convention on Recognition and Enforcement of Foreign Arbitral Awards.

the threshold issue in this case is one controlled by *federal* law: whether Allstate's arbitration agreements are enforceable. Requiring abstention under these circumstances turns principles of comity on their head.[23]

B. The McCarran-Ferguson Act Does Not Support Abstention In This Case

Petitioner contends that the policy underlying the McCarran-Ferguson Act reflects Congressional support for a rule of abstention in cases relating to state insurance liquidation proceedings. Pet. Br. at 46. Petitioner does not suggest that the Act, by its terms, would permit a State to override a Congressional grant of jurisdiction. In any event, neither the language nor the policy of McCarran-Ferguson would provide any support for such an interpretation.

McCarran-Ferguson provides that acts of Congress shall not be construed to "invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance." 15 U.S.C. § 1012. Any construction of McCarran-Ferguson to override principles of federal jurisdiction would mean that California could adopt a law barring all insurers from suing each other in federal court, and all federal statutes granting federal jurisdiction would be unavailable to insurers absent an express provision by Congress to the contrary. That construction is untenable for two reasons.

First, a state court's determination of an insurer's right of access to federal courts relates to jurisdiction, and not to the regulation of the "business of insurance." *Id.* at § 1012(b). This Court recently explained in *Hartford Fire Insurance Co. v. California*, 113 S.Ct. 2891 (1993), that the "business of insurance" refers to "mercantile transactions" that have the "effect of transferring or spreading

[23] *See New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. at 362 (1989) (federal court should not abstain from deciding a preemption challenge to a state regulatory scheme).

a policyholder's risk"; constitute an "integral part of the policy relationship"; and are limited to entities "within the insurance industry." *Id.* at 2901. A litigant's practice of invoking federal jurisdiction when established by Congress in no sense satisfies these criteria. Perhaps of greatest importance, the choice of jurisdiction does not in any way affect the allocation of risk established by contract or state law.[24]

This Court has in fact held that practices related to claims adjudication which were far more "mercantile" in character were not part of the "business of insurance." [25]

[24] *See United States Dept. of Treasury v. Fabe*, 508 U.S. ——, 113 S.Ct. 2202, 2209-10 (1993) (holding that an Ohio insurance insolvency law that granted priority to policyholders and administrative expenses was part of the "business of insurance" because "there [would be] no risk transfer at all" if the terms of the policy were not performed due to insolvency). *Fabe* cannot be read to permit States to exclude federal jurisdiction as a means of ensuring performance of insurance policies. This Court emphasized that McCarran-Ferguson should not be read to displace federal law where the purposes of the federal law are "perfectly compatible" with the state's interest in protecting policyholders. 113 S.Ct. at 2208 (*quoting SEC v. National Securities, Inc.*, 393 U.S. 453, 463 (1969)). In *Fabe*, there was a "direct conflict" between the state's interest in ensuring that policyholders are paid and the federal government's interest in receiving payment. *Id.* The state's interest in securing performance of insurance policies is not, however, in "direct conflict" or "incompatible" with the assertion of federal jurisdiction to resolve disputes. *Id.*

[25] In *United Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), an insurer utilized a peer review committee to determine whether policyholder claims for chiropractor services were covered by their policies. The insurer's right to use this process was established by the terms of the policy. This Court nevertheless found that the claims review process was not an integral part of the policy relationship, and that it was not a term that served to spread and underwrite the policyholder's risk. *Pireno* emphasized that the "challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by [Petitioner's] insurance policies." *Id.* at 130. Determining the availability of federal jurisdiction is even further removed from the business of insurance than the peer review process at issue in *Pireno*.

Second, States simply have no constitutional power to adopt rules or statutes that bar individuals from gaining access to federal courts. *See, e.g., General Atomic Co. v. Felter*, 434 U.S. 12, 16 (1977) (finding that "state courts are *completely without power*" to restrain individuals from seeking access to federal court) (emphasis added); *Donovan v. Dallas*, 377 U.S. 408, 413 (1964). Congress did not delegate power to the States to exercise authority that they otherwise lacked. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985) (holding that McCarran-Ferguson did not permit States to regulate the business of insurance in a manner that violated the equal protection clause because Congress "did not intend . . . to give the states any power . . . other than what they had previously possessed"). There is accordingly no basis to infer that Congress sought to empower States to impair litigants' fundamental rights of access to federal courts pursuant to the terms of generally applicable jurisdictional statutes.[26]

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[26] *See Grimes v. Crown Life Ins. Co.*, 867 F.2d 699, 702 (10th Cir. 1988), *cert. den'd*, 489 U.S. 1096 (1989) (McCarran-Ferguson does not alter the scope of diversity jurisdiction); *Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1379 (7th Cir. 1989) (States may not "obliterate the diversity jurisdiction of a district court" by claiming exclusive jurisdiction over the business of insurance).

CONCLUSION

For the reasons set forth herein, amici request this Court to affirm the decision of the Ninth Circuit.

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